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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MOISES ISAIS et al.,

Defendants and Appellants.

G041858

(Super. Ct. No. 07CF2073)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant Moises Isais.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant Rene F. Funes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Moises Isaïs and Rene F. Funes were both convicted of second degree robbery (count 1), dissuading a witness by force or threat (count 2), and street terrorism (count 3). The jury also found true the allegations that counts 1 and 2 were committed for the benefit of a criminal street gang, and the codefendants vicariously used a firearm. The trial court sentenced Isaïs to prison for 13 years, and Funes to prison for seven years to life. On appeal, Isaïs and Funes challenge the sufficiency of the evidence supporting the street terrorism convictions. In addition, they argue the gang expert's testimony was improper. We find the arguments lack merit, and we affirm the two judgments.

I

One afternoon in May 2007, Isaïs, Funes, and a female accomplice robbed Raul Segura's store. During the commission of the crime, Isaïs pointed a gun and Funes pointed a knife at Segura. They took money from the register, and took Segura's watch and wallet. As they exited the store, they threatened to shoot Segura's entire family if he talked to the police.

Before Isaïs was arrested, Segura twice saw him near his store. Segura told his daughter, Marisol, what the robbers looked like. A few days after the robbery, Marisol saw a man who had the letters "S" and "N" tattooed on the back of his head. He was standing near the store with Isaïs, who Marisol recognized from school. Marisol was familiar with the Santa Nita gang because it claimed the neighborhood in which she grew up.

Six days after the crime, Segura identified Isaïs and Funes from photographic lineups. Funes had the letters "SN" tattooed on the back of his head. The police officers first located and arrested Funes. They found Segura's watch in his

apartment. Within a few weeks, Isais was apprehended while riding in a car with Santa Nita gang members. Police officers found a flashlight with markings that read “SN,” “felon,” and “minor” near where Isais was seated in the car.

At the trial, the parties stipulated that on the day of the robbery Santa Nita was a criminal street gang whose members had “engaged in a pattern of criminal activity.” Santa Ana Police Detective Jeff Launi testified as the prosecution’s gang expert, having more than 26 years of experience. He stated the letters “SN” stand for the neighborhood of Santa Nita, and the letters “SNR” stand for “Santa Nita Rifa” or “Santa Nita Rules.” He discussed the gang’s boundaries, colors, and criminal history. When presented with a hypothetical that mirrored the facts of this case, Launi opined the robbery would promote and benefit the gang. He explained gang members typically work together and commit crimes in their own territory to promote the gang’s power and control. He stated the gang members are able to control their territory by committing violent crimes and consequently “instilling . . . fear and intimidation.”

Launi opined Funes was an active participant in the gang when the robbery occurred based primarily of evidence gathered from Funes’s prior encounters with the police. Launi noted Funes had gang tattoos on his body, he had a gang moniker (Rhino), he was seen wearing the gang’s color (a baby blue bandana), and he kept a roll call of gang monikers in his apartment. Funes had previously told police he “walked into” the Santa Nita gang when he was younger because he lived in the neighborhood and had friends in the gang. On previous occasions, Funes had been seen in the presence of known gang members. Launi acknowledged he was familiar with Funes and his family.

Launi testified he did not know Isais personally but knew he had older brothers in the Santa Nita gang. Although Isais did not have any gang tattoos, Launi opined Isais was an active participant (and not merely an associate) because: (1) on over four occasions police had seen Isais in the presence of known gang members; (2) twice police had seen Isais riding in a stolen car with known gang members; (3) twice Isais told

police he “kicks it” with Santa Nita members; and (4) Isais lives just outside the gang’s claimed boundaries, but he was frequently seen 13 blocks away from home near Segura’s store, located in the heart of Santa Nita gang’s claimed territory.

II

Penal Code section 186.22, subdivision (a)¹ punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” Isais and Funes claim there was insufficient evidence to support the conclusion they were active participants in the Santa Nita gang at the time of the robbery. We disagree. We review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

“In the context of the California Street Terrorism Enforcement and Prevention Act (STEP) (§ 186.20 et seq.), active participation is ‘involvement with a criminal street gang that is more than nominal or passive.’ (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) It is not enough that a defendant ha[s] actively participated in a criminal street gang at any point in time, however. A defendant’s active participation must be shown at or reasonably near the time of the crime. Section 186.22, subdivision (a) uses the present tense—‘actively participates’—as did the Supreme Court in *People v. Castenada*—‘involvement . . . that is more than nominal or passive.’ [Citation.]” (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508-1509, italics omitted.)

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

A. The Gang Expert's Testimony

Isais and Funes assert the trial court should not have allowed the gang expert to testify they were active participants in the gang because it was improper opinion evidence as to an ultimate issue in the case. They argue the stipulation Santa Nita was a criminal street gang whose members have engaged in a pattern of criminal gang activity meant the sole element left for the jury to decide was whether they were active participants in a criminal street gang at the time of the crime.

Not so. They have forfeited the right to raise this issue by failing to object at trial. (See *People v. Lindberg* (2009) 45 Cal.4th 1, 48.) And, in any case, we conclude under these circumstances the expert's opinion may embrace an ultimate issue to be decided by the jury because it would assist the trier of fact. (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 507 (*Valdez*).)

An expert witness may offer an opinion on a subject which is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," even when it encompasses an ultimate issue to be decided by the jury. (Evid. Code, §§ 801, subd. (a), 805; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371, overruled on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) However, it is inadmissible "if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*Valdez, supra*, 58 Cal.App.4th at p. 506.) Isais and Funes acknowledge expert testimony on the culture, habits, and psychology of gangs is permissible when relevant because these subjects are beyond the common experience of most jurors. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *Valdez, supra*, 58 Cal.App.4th at p. 506.) They argue the issue of "active participation" is not beyond the common experience of a juror. We disagree. The Santa Nita gang is not a typical social club or fraternity with clearly defined or commonly understood rules for participation. The trial court reasonably concluded the expert's testimony would assist the jury in determining whether Isais and Funes were currently involved with the

group based on their conduct and connections. The trial court did not abuse its discretion in allowing the evidence. (See *Valdez, supra*, 58 Cal.App.4th at pp. 505-507.)

B. Isais

Isais points to the following facts to support his argument he was not an active participant in the gang at the time of the crime. He had no gang-related tattoos, he was not seen wearing gang clothing, he did not flash gang signs or otherwise indicate during the robbery that it was gang related. However, we cannot retry the case. “[T]he sufficiency of the evidence showing active participation is not altered by the existence of other evidence offered by defendant to show he was not an active participant in the gang. Resolution of conflicting evidence and credibility issues was for the jury to decide. [Citation.] It is clear from the verdict finding defendant guilty of street terrorism that the jury believed he was actively participating in the gang. Because substantial evidence supports this determination, “that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]” [Citation.]’ [Citation.]” (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.)

Here, there was sufficient evidence to show Isais was an active participant in the Santa Nita gang. The robbery occurred in gang territory and with the assistance of an active gang member having a large tattoo advertising the Santa Nita gang on the back of his head. After the robbery, Isais was apprehended in a car with two other Santa Nita gang members, and he was sitting near items containing the gang’s markings. A gang expert opined Isais was an active participant of the Santa Nita gang at the time of the robbery. Given Isais’s many prior contacts with Santa Nita gang members, and his participation in a robbery that would benefit the gang, with an active participant with the gang’s tattoo prominently displayed, we find no error.

C. Funes

Similarly, Funes cites to only the evidence supporting his claim he was not an active participant of the Santa Nita gang. He asserts the large tattoo on his head

established only a prior association with the gang, not current active participation. He asserts nothing done or said during the robbery suggests it was committed for a gang. The name of the gang was not mentioned, and he was not wearing the gang's colors at the time. However, as mentioned above our review is limited: We conclude there was sufficient evidence to support the jury determination. Launi opined Funes was an active participant of the gang when he committed the robbery based on his prior contact with Funes, police reports, tattoos, gang-related possessions, and the moniker. Funes had a long history of contacts with Santa Nita gang members. The robbery was committed in the gang's territory, and Launi explained how the crime would benefit the gang. As for the tattoo, Launi explained a gang-specific tattoo indicates you represent that gang. He testified there would be "repercussions" for someone who was not a Santa Nita gang member to commit a crime in the gang's territory, bearing the gang's tattoo on his head as it would be considered a "false claim." In light of the above, we find no reversible error.

III

The judgments are affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.